IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1481

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ROY BACA; ROBERT T. POOLE; NANCY KOCH; LOUIS SAAVEDRA; RICHARD VAUGHN, City Commissioners for the City of Albuquerque, all of the above individually and in their official capacity, and HERB SMITH, City Manager, individually and in his official capacity, *Petitioners,*

v.

CHICANO POLICE OFFICER'S ASSOCIATION and SEGILFEREDO SANCHEZ; VINCE VILLANUEVA; DANIEL GARCIA; ARCHIE BORUNDA; ELOY SANCHEZ; ROBERT CHAVEZ; FLAVIO ROMERO; ERNEST OLAGUE; DAVID GARCIA; MAURICE MOYA; FRANK CHAVEZ; and ROY BESERRA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above-named Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this cause on November 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit reported at 526 F.2d 431, appears in the Appendix hereto. The District Court for the District of New Mexico did not render a written opinion.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on November 20, 1975. Petitioners filed, in the Court of Appeals, a timely Petition for Rehearing and Suggestion for Rehearing *en banc*, which were denied on January 14, 1976. This petition for writ of certiorari was filed within 90 days of January 14, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an unincorporated association (composed of incumbent Chicano police officers) and individual incumbent Chicano police officers have standing, under Article III of the Constitution of the United States, to challenge the hiring procedures (including entry level examinations) of a municipal police department, as being violative of 42 U.S.C. §§ 1981, 1983 and 1985.

2. Whether results of different promotional examinations, given in prior years, are relevant to individual claims (as opposed to class claims) that present promotional examinations have a discriminatory impact in violation of 42 U.S.C. §§ 1981, 1983 and 1985.

3. Whether a trial court, in an employment discrimination case brought under 42 U.S.C. §§ 1981, 1983 and 1985, may properly refuse to consider summaries of results of prior promotional examinations,

which contain classification and compilation errors, even though the objections raised to admission of such summaries were on different grounds.

4. Whether a prima facie case of employment discrimination, under 42 U.S.C. §§ 1981, 1983 and 1985, can be proved by statistics showing a two to one pass rate (or less), as between total examinees and Chicano examinees, where the evidence shows the ratio to be unstable, because of the small sample base.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article III, § 2, Clause 1:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

CONSTITUTION OF THE UNITED STATES

Amendment XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE, Title 42:

§ 1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equally benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 1985. Conspiracy to Interfere with Civil Rights

* * * * * * * * *

"(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged

therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

This is a case brought by twelve Chicano Police officers and the Chicano Police Officers Association (Association) (Respondents herein) against the Chief of Police, City Manager and Commissioners of the City of Albuquerque, New Mexico (Petitioners herein) challenging certain employment practices and procedures of the Albuquerque Police Department (Department) as being unconstitutionally discriminatory, in violation of 42 USC §§ 1981, 1983 and 1985 and other federal statutes (R., Vol. I, 9).

The Complaint did not allege a class action, but prayed for declaratory and injunctive relief from the results of promotional examinations conducted by the Department on June 2, 1973. (R., Vol. I, 9) The individual Respondents failed to qualify to take the examinations, or failed the examinations. Respondents also challenged the entry level requirements of the Department. (R., Vol. I, 9)

In August, 1973, the Department was composed of 402 commissioned police officers, 86 of whom were Chicano. (R., Vol. VI, 82) The membership of the Association is not limited to Chicano police officers (R., Vol. VI, 81). No member of the Association and no indi-

vidual plaintiff had been denied employment with the Department (R., Vol. I, 286).

A Department general order required: (1) that all officers to be promoted after January 1, 1972, must have completed at least six semester hours of college accredited study; (2) for promotion during 1974, twelve semester hours were required; (3) thereafter, an additional six hours per year is required until the officer obtains his bachelor's degree. (Pl. Ex. 6) Four of the individual Respondents lacked the six hours of college credit in 1973. Approximately 75 percent of the Chicano officers in the Department attended college in 1973 and received incentive pay for such attendance. (R., Vol. I, 293).

On June 2, 1973, the Department conducted examinations for promotion to the ranks of Sergeant, Lieutenant and Captain. For the most part, the written examinations were on texts in the areas of police administration, management, psychology, leadership and planning. Departmental General Order gave different weighting to the applicants' test score, supervisor's evaluation and oral interview. (Pl. Ex. 6)

Members of the Association did not read the assigned texts, *in toto,* but studied from chapter outlines prepared by one another. The Association urged all of the members to apply for promotion and take the examination. At least one member testified that he took the examination as a "dry run," not expecting to pass. (P., Vol. VII 157-159, 259-260, 303-305; Vol. VIII, 438). Dr. Frederic Carleton, an expert in personnel testing, testified that where there is self-selection of applicants on an employment test, the scores will range higher than where there is mandatory testing of an entire group. (R., Vol. X, 772-784)

The results of the June 2, 1973 Sergeants and Lieutenants examinations were as follows:

Sergeant's Examination:

(1)	Total Examinees	90
	Passing Examinees	17
	Percentage Passing	19%
(2)	Spanish-surnamed Examinees	26
	Passing Examinees	3
	Percentage Passing	11.5%

Lieutenant's Examination·

(1)	Total Examinees	44
	Passing Examinees	7
	Percentage Passing	16%
(2)	Spanish-surnamed Examinees	7
	Passing Examinees	1
	Percentage Passing	14%
(3)	Non-minority Examinees	36
	Passing Examinees	5
	Percentage Passing	14%

(R., Vol. VI, 63, 64, Pl. Ex. 14)

No Chicano took the June 2, 1973 examination for Captain (R., Vol. VI, 64). The examinations were entirely different, in content and weighting, from promotional examinations given by the Department in past years. (R., Vol. XIII, 460, 487) Dr. Carleton, the expert witness, testified that the statistics of the June 2, 1973 promotional examinations did not show a significant adverse affect on the Chicano officers. (R., Vol. X, 770-771, 772-787; Defts. Exs. 2, A1, B1, C1, D1, R., Vol. IX, 602-606)

At the trial, Respondents offered tabulations of results of promotional examinations given during the

years 1966 to 1971. Respondent Frank Chavez, who had compiled the tabulations, admitted on cross-examination that he had failed unintentionally to include in the tabulation several Spanish surnamed officers, and had omitted purposely several other Spanish surnamed officers, because he knew that these persons were really "Anglos." (R., Vol. VII, 109-114) Petitioners objected to the admission of the tabulations, on the grounds of irrelevancy. The District Court did not consider the tabulations in making its findings.

The question of standing of the Association to challenge the Department's entry level requirements was the subject of an affidavit of Respondent Frank Chavez, admitted by stipulation, subject to certain objections. That affidavit stated, *inter alia,* that (1) the Association "must have the support of as many Chicanos, and particularly Chicano policemen, as possible," (2) that the Association can negotiate effectively "only if it represents a substantial number of policemen" and that (3) discrimination against Chicanos in recruitment dilutes the strength of the Association and its effectiveness. (R., Vol. I, 202)

At the close of Respondents' evidence, the District Court granted Petitioners' Rule 41(b) motion, and dismissed the Complaint. The District Court concluded, *inter alia:* (1) that neither the Association nor any individual Respondent had standing to challenge the Department's entry level requirements; (2) that the Respondents had failed to present a *prima facie* case that the college educational requirement for promotion adversely affected them; (3) that the evidence failed to show that the promotional examinations caused a statistically significant discriminatory effect

on the Chicano officers; (4) that the two to one passing ratio of total to Chicano officers on the Sergeant's examination was not significant because of the small sample size, causing the ratio to be unstable; and (5) that the Respondents had shown no right to relief. (R., Vol. I, 293)

On appeal, the Court of Appeals for the Tenth Circuit reversed, holding, in short, that (1) the individual Respondents and the Association had standing to challenge the Department's entry level requirements; and (2) the Respondents had presented a *prima facie* case that the Department's promotional requirements were unconstitutionally discriminatory.

The findings and conclusions of the District Court, in their entirety, and the judgment were vacated. The case was remanded to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT CONCERNING STANDING TO SUE IN A FEDERAL COURT.

The District Court concluded that neither the individual police officers nor the Association had standing to challenge the hiring policies of the Department. (R., Vol. I, 289) In reversing, the Court opined that (1) secondary effects of discriminatory entry level requirements upon incumbent police officers afforded a valid basis of standing to the individual Respondents, and (2) the Association had standing because of its "direct stake . . . in challenging barriers against employment of those from whom it might well enhance its membership and resources to attain its goals". (Ct. App. Opn., App. p. 9a)

The Court of Appeals reached its decision that all of the Respondents had standing to attack the entry level requirements, in spite of the following facts: (1) that the litigation was not brought as a class action; (2) that none of the individual Respondents or the membership of the Association had been excluded from employment because of the Department's hiring policies; and (3) that challenged hiring policies did not directly apply to members of the Association or the other Respondents, all of whom were incumbent police officers.

It is respectfully suggested that the holding of the Court of Appeals is indirect conflict with decisions of this Court defining the "case and controversy" requirements of Article III of the United States Constitution, and stating prudential standing limitations for the federal court system. The Court of Appeals, although citing the recent standing pronouncement of this Court in *Warth* v. *Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), apparently disregarding the guidance offered by that decision.

Standing of persons, not directly affected, to maintain a civil rights action, challenging employment practices, is an issue of primary importance which frequently confronts the lower federal courts. The Tenth Circuit has assumed a most permissive stance, allowing civil rights litigants to challenge employment policies which, at most, affect them only remotely. That stance should be reviewed.

A. Neither the Association Nor the Other Plaintiffs Made a Showing of Injury Sufficient To Establish the Specificity and Causation Requirements of Warth.

In *Warth*, various plaintiffs [1] sued the Zoning, Planning and Town Boards of the Town of Penfield in New York to enjoin the enforcement of zoning ordinances and other land-use restrictions which, it was claimed, effectively excluded persons of low- and moderate-income from living in Penfield. The low-income taxpayers asserted that because of the zoning ordinance, they were unable to purchase housing at prices they could afford. The district court for the Second Circuit dismissed for lack of standing. The Court of Appeals for the Second Circuit affirmed the dismissal. This Court, speaking through Justice Powell, set forth the two criteria for determining the nature of the injury cognizable by the federal courts and the casual relationship between the challenged governmental restriction and the injury alleged. This Court first determined that even where a plaintiff has alleged sufficient injury to meet the "case and controversy" requirement, the plaintiff "generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights and interests

[1] The plaintiffs included 8 individual plaintiffs and Metro-Act of Rochester, Inc., a not-for-profit corporation, having as its purpose to urge action to alleviate the general shortage of housing for low- and moderate-income persons. Five of the plaintiffs were resident-taxpayers of the City of Rochester or of surrounding communities. Three plaintiffs were low- and moderate-income residents of Rochester.

of third parties".[2] 45 L. Ed. 2d at p. 355. This Court then enunciated a simple test for determining whether the litigant had standing to assert his claim: The plaintiffs must show by a *substantial probability* that but for illegal governmental action, injury to the plaintiff would not occur. In short, where a government regulation causes direct harm to a party because of its application to third persons, the indirectness of the injury may not preclude the party from having standing but requires specific factual allegations and proof establishing demonstrable causation between the injury and the governmental action.

The failure of proof of injury and causation fatal to plaintiffs' claim in *Warth* is replicated in the case at bar. The Court of Appeals placed substantial reliance on the Affidavit of Respondent Frank Chavez. (R., Vol. I, 202) That affidavit is totally devoid of any specific factual allegations upon which the Association's fulfillment of its objectives can be connected with elimination of the challenged hiring policies. The Affidavit opines that the Association "must have the support of as many Chicanos and particularly Chicano policemen as possible." It concludes that the Association can negotiate effectively "only if it represents a substantial number of policemen". Finally, it offers an opinion, unsubstantiated by specific factual allegations, that discrimination against Chicanos in recruitment

[2] In *Warth*, as in the case at bar, the governmental restriction in this case does not apply to the particular plaintiffs to the action. The low-income plaintiffs were not residents of Penfield and the ordinance in question applied only to Penfield, not Rochester. Similarly, the governmental policies attacked in the case at bar did not apply to any of the named plaintiffs, but rather to unnamed, unidentified, potential employees of the police department.

dilutes the strength of the Association and its effectiveness. (R., Vol. I, 202)

These are merely bald conclusions unsupported by any specific factual proof. The record contains no evidence showing a substantial likelihood of an enhanced negotiating position should the hiring policies be invalidated. Respondents did not show a causal relationship: (1) that should more Chicanos be employed as policemen, the membership of the Association would in fact be increased; (2) that even should more Chicanos join the Association, the Police Officer's Association would be able to negotiate more effectively with the department; and (3) that the Association had ever negotiated with the Albuquerque Police Department, or had in the past suffered any inability to do so effectively because of inadequate numbers. There was no testimony from any witness that the Association had been stymied in its attempts to deal with the Department because of insufficient numbers or that the Association's negotiating position would be affected favorably by an increase in membership. Indeed, there is no indication that the Association had ever negotiated with the Department in the past.

As the trier of fact, the District Court found Chavez' conclusionary allegations insufficient. In reversing, the Court of Appeals held that the District Court should have inferred the necessary causal relationship from the evidence that approximately 42 of the 70 Chicano officers on the force were signed members of the Association.[3] It is submitted that such a conclusion violates the spirit and the letter of *Warth*.

[3] In fact, the Court of Appeals used an erroneous figure for the total number of Chicano officers on the force. In August, 1973 there were 86 Chicano officers. See footnote 10 of Court of Appeals opinion. See also R., Vol. IX, 643.

B. Neither the Association Nor the Other Plaintiffs Have Standing To Assert the Rights of Third Parties.

In *Warth,* this Court specifically limited those cases where a party will be allowed to challenge governmental restrictions based on violation of a third party's rights. The first exception is where Congress confers standing by statute to a litigant who would not otherwise have had it. The second exception was where enforcement of the challenged restriction would result indirectly in violation of third party's rights. The third exception involved cases where the third party was under a disability which precluded the assertion of his legal or constitutional rights himself.

In the case at bar, Congress has not conferred any special standing on incumbent employees to assert the rights of applicants for employment. The vindication of Respondents' rights does not depend on the assertion of third persons' rights. See *Barrows* v. *Jackson,* 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953). And there is no disability which prevents frustrated applicants from bringing their own lawsuit if they so desire

This Court's treatment of the Metro-Act's standing in the *Warth* case disposes of the precise argument adopted by the Court of Appeals, in the instant case, on *jus tertii* standing. Metro-Act, a not-for-profit corporation, alleged that 9% of its membership were present residents of Penfield. For this reason, the zoning ordinance directly applied to them. Metro-Act had argued that these Penfield residents were directly affected by the exclusionary zoning practices by being deprived of the benefits of living in a racially and ethnically integrated community. This argument is identical to that of the Association and the other Respondents that they have been deprived of a racially integrated police force which might enhance the position of Chicanos generally within the Department. On this point, too, the opinion of the Court of Appeals directly conflicts with the *Warth* decision.

In its opinion, the Court of Appeals observed that "there is no indication of a lack of concrete adverseness between the position the plaintiffs take and that of defendants", (Opin., Ct. App., App. p. 11a) referring to the requirement of true adversity discussed in *O'Shea* v. *Littleton*, 414 U.S. 488, 493-494, 38 L.Ed.2d 674, 94 S. Ct. 669 (1974), and *Baker* v. *Carr*, 369 U.S. 186, 204 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). Again, the teaching of *Warth* was missed. Like the plaintiffs in *Warth,* the incumbent police officers and the Association have no real proven stake in the vindication of rights of absent persons. In such cases, concrete adverseness cannot be insured.

Because of the direct and apparent conflict between the opinion of the Court of Appeals, and this Court's decision in *Warth,* the Writ should issue.

2. THE OPINION OF THE COURT OF APPEALS, HOLDING AS A MATTER OF LAW THAT RESPONDENTS HAD PRESENTED A PRIMA FACIE CASE CONFLICTS WITH DECISIONS OF THIS COURT AND SUBSTANTIALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In reversing the District Court's dismissal of the Complaint, the Court of Appeals held:

—That the results of different promotional examinations for the ranks of sergeant, lieutenant, and captain, given from 1966 to 1971, were relevant to the respondents' individual claims (as opposed to a class action) that the promotional examinations given on June

2, 1973 had a discriminatory impact on the Chicano Police Officers taking that examination.

—That the District Court erred by not considering proferred summaries of past examinations, which contained classification and compilation errors, since Petitioners' objections thereto raised only relevancy grounds.

—That Respondents' proof of a two to one pass rate (or less), as between total and Chicano examinees proved a *prima facie* case, in spite of substantial evidence that the ratio was unstable, because of the small base of the statistics.

It is respectfully submitted that these holdings conflict with decisions of this Court and substantially depart from the accepted and usual course of judicial proceedings.

A. The Relevancy of Prior Examination Results

Despite the fact that this action was not brought as a class action, but only for declaratory and injunctive relief to individual police officers who failed the promotional examinations given on June 2, 1973, the Court of Appeals held that results of different promotional examinations given from 1966 to 1971 were relevant.

All of the individual Respondents took the examinations given on June 2, 1973 (R., Vol. V, 6€; Vol. VI, 194, 245, 289, 319, 332; Vol. VII, 348, 398, 411-412, 435), and were asking for individual relief from the results of those examinations. The June 2, 1973 examinations were substantially different from prior examinations in weighting and content. (R., Vol. VI, 289; Vol. VII, 460, 487).

The Court of Appeals recognized the standard for proof of a *prima facie* case, established by *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 28 L.Ed.2d 158, 191 S.Ct. 849 (1971)—that the plaintiff needs only to show that the *challenged procedures* have a discriminatory result. However, the Court of Appeals reasoned that proof of a *prima facie* case may necessitate "a backward glance . . ." (quoting its decision in *EEOC* v. *University of New Mexcio, Albuquerque,* 504 F.2d 1296, 1304 [1974]), and the plaintiff should be free ". . . to develop proof of the general overall trends in hiring and promotion policies" (citing its decision in *Rich* v. *Martin-Marietta Corp.*, 522 F.2d 333, 343, 345 [1975]). In support of its conclusion that results of prior examinations were relevant, the Court of Appeals relied upon cases involving *class action challenges* to prior and present employment practices and procedures. See *Chance* v. *Board of Examiners,* 458 F.2d 1167 (2nd Cir., 1972), and the cases set forth in footnote 6 of the Court of Appeals opinion App., p. 13a. Here, the issue was whether the June 2, 1973 examinations had an unconstitutional discriminatory impact. Class claims related to prior examinations were not raised. Thus, statistics of prior years were not probative.

In effect, the Court of Appeals held that, even if the results of the challenged examinations showed no discriminatory impact, the aggregate results of totally different examinations given during the prior seven years should have been considered on this issue. It is submitted that this broad concept of relevancy of statistical data to make a *prima facie* showing in an employment civil rights case is in conflict with the teaching of *Griggs,* and should be reviewed by this Court.

B. The Propriety of Rejecting Unreliable and Inaccurate Evidence, Even Though the Objection Is on the Grounds of Relevancy.

At the trial of the case, Respondents offered into evidence tabulations of the results of prior promotional examinations given by the Department. (Plaintiffs Exhibits 7-12). On cross-examination, Respondent Roy Chevez admitted that, in preparing the tabulations, he had overlooked several Spanish surnames and had purposely omitted several more Spanish surnames because such individuals, in his opinion, were really "Anglos" (R., Vol. I, 109-114). Petitioners raised objections to the tabulations on the specific grounds of relevancy. Although the District Court reserved its ruling on admission of the tabulations, in making its findings, no mention of prior examination results was made.

The Court of Appeals held that it was error for the District Court to give no consideration to the tabulations, stating that Petitioners' objections to admission of the tabulations ". . . raised only relevancy and (we) must assume this was the basis for the trial court's exclusion of the proof." (Ct. App. Opn., App. p. 12a). Since the Court of Appeals viewed the statistics of prior examinations as relevant, the failure of the trial court to consider these tabulations was found to be erroneous. Disregarded entirely by the Court of Appeals was the evidence indicating that the tabulations were unreliable because of compilation errors.

The ruling of the Court of Appeals conflicts with settled decisions of this Court, establishing the rule that ". . . a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed." *Kansas*

City Southern Railway Co. v. *Jones,* 241 U.S. 181, 60 L.Ed. 943, 3 Sup. 513 (1916); *Hamling* v. *U.S.*, 418 U.S. 87, 108, 41 L.Ed.2d 590, 615, 94 S.Ct. 2887 (1974). In its opinion on the Petition For Rehearing, the Court of Appeals attempted to avoid this apparent conflict, stating: "Without considering whether such rule would apply here, this record convinces us that rejection of all the proof of prior examinations cannot be sustained here." (Ct. App. opn., App., 18a). The "proof" offered was the tabulations, which were admittedly inaccurate. Thus, the Court of Appeals substitutes its opinion of the reliability of evidence for that of the District Court, and in the process, violates fundamental rules of evidence and customary rules of appellate review.

Because of the conflict between this holding of the Court of Appeals and long-standing decisions of this Court, the Writ should issue.

C. The Significance or Insignificance of an Unstable Pass-Fail Ratio

The results of the June 2, 1973 examinations conducted by the Department for promotion to the rank of Sergeant showed that 19 percent of 90 total examinees passed, while 11 percent of the 26 Chicano examinees passed. The District Court noted that this two to one ratio was highly unstable in that a variance of two Chicanos passing or failing would yield ratios between five to one, and one to one.[4] Accordingly, the

[4] Although the Court of Appeals set aside all findings and conclusions, there was no statistical evidence that the examinations for promotion to lieutenant and captain had a disparate effect. The pass ratio was one to one for the lieutenant's examination. None of the five examinees taking the captain's examination was Chicano.

District Court concluded that the disparity in pass rate was not statistically significant. This conclusion is supported in the record by the testimony of Dr. Frederic Carleton, a well qualified psychometrician, who testified that the statistics did not significantly show any adverse impact of the examinations. (R., Vol. X, 770-778, Defts. Exhibits 2, A1, B1, C1, D1)

Regardless of substantial evidence to support the District Court's conclusion that the ratio was unstable because of the small sample size, the Court of Appeals reversed, reasoning that rejection of small sample statistics would " . . . deny employees in small plants the type of protection the civil rights statutes afford." (Ct. App. Opn., App. p. 15a). Thus, the Court of Appeals arrived at a very novel (and untenable) stand—that a *prima facie* case of unconstitutional employment discrimination may be shown from unstable statistics derived from a small sample base.

Moreover, the Court of Appeals rejected the District Court's reliance upon evidence that the test statistics were not probative. Evidence which was held, as a matter of law, to be of no consequence in assessing the reliability of the statistics included: (1) that the Chicano officers did not read the texts assigned, but studied from chapter outlines prepared by one another; (2) that the Association urged all Chicano officers to take the tests; (3) that one Chicano officer took the test as a "dry run," not expecting to pass; (4) that when a test is given on a self-selection basis, the examinees will score higher than when all within a group are tested. (R. Vol. VII, 157-159, 259-260, 303-305; Vol. VIII, 438)

The Court of Appeals held that reliance upon this evidence by the trial court was erroneous, in that an

improper burden was imposed upon the Respondents—i.e., to show that non-minority examinees passed with equal or less preparation than the Chicano examinees.

In holding that a *prima facie* case had been proved, as a matter of law, the Court of Appeals stripped the District Court of all discretion to weigh the reliability and probative value of statistical evidence. It is respectfully submitted that such holding is in conflict with the tests established by this court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 848 (1971), and violates basic trial principles of the federal court system.

CONCLUSION

Upon the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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April 13, 1976

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 74-1163.

CHICANO POLICE OFFICER'S ASSOCIATION ET AL.,
Plaintiffs-Appellants,

v.

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ET AL., *Defendants-Appellees.*

Ray M. Vargas, Albuquerque, N. M. (Richard C. Bosson, Albuquerque, N. M., Vilma S. Martinez, Sanford Jay Rosen and Drucilla S. Ramey, San Francisco, Cal., and Joseph R. Grodin, San Francisco, Cal., of counsel, University of California Hastings College of Law, on the brief), for plaintiffs-appellants.

William S. Dixon, Albuquerque, N. M. (Frank L. Horan, City Atty., and Rodey, Dickason, Sloan, Akin & Robb, P. S., and Duane C. Gilkey, Albuquerque, N. M., on the brief), for defendants-appellees.

Before SETH, HOLLOWAY and DOYLE, Circuit Judges.

HOLLOWAY, Circuit Judge.

This civil rights suit challenges both the hiring and promotion procedures of the Albuquerque, New Mexico, Police Department (the Department) as racially discrimintory against Spanish-speaking and surnamed Americans. The plaintiffs are twelve Chicano employees of the Department and the Chicano Police Officer's Association (the Association).[1] The defendant Stover is the Chief of Police of the

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[1] Throughout this opinion we will use the term "Chicano" to designate the racial minority of Spanish-speaking and Spanish surnamed Americans whom the suit concerns.

Department and the other defendants are the City Commissioners and City Manager of Albuquerque.

The complaint essentially alleged that the defendants had deprived plaintiffs, under color of State law, of rights, privileges and immunities secured by the constitution and laws of the United States in violation of 42 U.S.C.A. §§ 1981, 1983 and 1985 (R. I, 9). The complaint averred that defendants employed hiring and promotion procedures including tests and other job criteria which are not substantially related to job performance and have the effect of excluding a disproportionate number of Chicanos from employment and promotions in the Department, thus violating rights secured by the equal protection clause; by 42 U.S.C.A. §§ 1981, 1983 and 1985, and other statutes. Jurisdiction was claimed under 28 U.S.C.A. § 1343(3) and (4), and declaratory and injunctive relief were sought.

After presentation of the plaintiffs' evidence, and that of two defense witnesses heard out of turn, defendants moved to dismiss under Rule 41(b), F.R.Civ.P., on the ground that plaintiffs had shown no right to relief. The trial court made written findings and conclusions adverse to the plaintiffs and dismissed.

On appeal plaintiffs argue principally that the trial court erred in that:

1. The court erred in holding that plaintiffs lack standing to challenge the hiring or entry level procedures of defendants; and

2. It was error to find and conclude that plaintiffs had made no *prima facie* case of the unlawfulness of the promotion procedures used by defendants.

We turn to the findings and conclusions of the trial court which are of critical importance.

I

The Trial Court's Findings and Conclusions

The trial court made these findings: The Chicano Police Officer's Organization is an unincorporated association composed chiefly of Spanish-speaking or Spanish surnamed police officers in the Albuquerque Police Department. Its membership is not limited to Spanish-speaking or Spanish surnamed officers and not all such officers are members of the Association. The Association seeks to achieve equal opportunity for Spanish-speaking or surnamed Americans in recruitment and promotions within the Department, and to discourage discrimination.[2]

The court found that no member of the Association and no plaintiff has been denied employment with the Department.

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[2] Plaintiffs' exhibit 1, a brochure of the Association, states that the Association's aims include, *inter alia:*

STATEMENT OF PURPOSE

The Chicano Police Officers Association also known as the Concerned Police Officers Association is dedicated to the following principles and purposes:

* * * * * * * *

2. To achieve equal opportunity in recruitment, promotion, assignment, evaluation, and other areas within all Police Departments.

* * * * * * * *

6. To actively support the recruitment of personnel for police work in such a manner as to insure proportionate representation within the profession of all cultural and ethnic groups of the population of our community.

7. To encourage racial and ethnic harmony within the profession, as well as between the profession and the community and to discourage racism and discrimination.

* * * * * * * *

10. To expand our knowledge of the various cultures and heritages of other people and to educate other members of the police profession on our own culture.

The court found further that police officers must be high school graduates or have obtained a general equivalency degree. The Department's General Order 71-23, issued December 17, 1971, requires that all officers to be promoted after January 1, 1972, must have completed at least six semester hours of college accredited study. Those to be promoted during 1974 were required to have completed twelve semester hours, and an additional six hours credit per year is required until a bachelor's degree is attained.

Promotional examinations were held on June 2, 1973. Four individual plaintiffs were ineligible to take the examination because they lacked the six hours of college credit. The court found, however, that there was ample notice and opportunity for completion of the six hour requirement prior to its application precluding officers from taking the examination. There had been an incentive pay of $1 per month for each hour of college credit, and from April, 1973, to June, 1978, 208 officers of the Department received incentive pay. Fifty-three of approximately seventy Spanish-speaking or surnamed officers received incentive pay under the program. 155 of approximately 305 Anglo officers received incentive pay. It was found that this demontrates that 75% of the Spanish-speaking/surnamed officers attended college during the period and that the educational requirement did not erect a barrier for a minority group and that the requirement did not have a discriminatory effect on Chicanos as a group.

The results of the June 2, 1973, examination were summarized by the court as follows:

A. Sergeant's Examination:

1) Total Examinees	90
Passing Examinees	17
Percentage Passing	19%
2) Spanish-surnamed Examinees	26
Passing Examinees	3
Percentage Passing	11.5%

B. Lieutenant's Examination:

1) Total Examinees	44
Pasing Examinees	7
Percentage Passing	16%
2) Spanish-surnamed Examinees	7
Passing Examinees	1
Percentage Passing	14%
3) Non-minority Examinees	36
Passing Examinees	5
Percentage Passing	14%

No Spanish-surnamed Americans took the June 2, 1973, examination for captain. The examinations were achievment tests and their subject matter was taken from tests on police administration, management, psychology, leadership and planning. Members of the Chicanos Police Officer's Association formed a study group. Some were assigned responsibility for outlining portions of the assigned texts. Several officers read some but not all the texts and relied on outlines for the material they did not read. The June 2, 1973, examination had not been used before and is not to be used in the future.

The court concluded that no plaintiff has standing to contest the hiring policies of the Department. The injury alleged by the Association and one individual plaintiff is that development of the power to negotiate for the betterment of the position of Chicanos is stifled by policies perpetuating under-representation of the Spanish minority on the police force. It was concluded, however, that the relief sought would not directly benefit the Association, and that the Association and its members have only an indirect stake in the outcome and are not entitled to assert the rights of those directly affected and not present in the suit.

The court concluded that the plaintiffs have failed to establish *prima facie* that the college educational requirement adversely affects minority groups. It concluded that the plaintiffs failed to show that the promotional examinations caused a statistically significant discriminatory impact on Spanish-speaking/surnamed officers. The overall pass ratio for each examination was small. 19 percent passed the sergeant's examination and 16 percent passed the lieutenant's examination. The ratio of Spanish-surnamed passing to non-minority passing was one to one on the lieutenant's examination and slightly less than two to one on the sergeant's examination.

The 11 percent pass rate for Spanish-speaking/surnamed examinees for sergeant is arrived at from a small sample, since only 26 Spanish-speaking/surnamed were eligible to take the examination. Three of the 26 passed. The trial court held that the 11 percent figure is not stable or highly reliable. A variance of two Spanish individuals passing or failing would yield ratios between five to one and one to one.

The court concluded that any significance the two to one ratio might have is undermined by the testimony. There was no showing that any other examinees were able to pass with equal or less preparation. Thus, the court concluded that it cannot be said that the disparity in pass rate is statistically significant.

The court concluded further that the plaintiffs have shown no right to relief. It was observed, however, that had they made a *prima facie* showing of a discriminatory impact of the tests, the defendants probably could not have carried their burden of persuasion; that defendants need to improve recruitment and promotion policies to alleviate under-representation of the Spanish minority at all levels of the Department; that the heavy reliance placed on the achievement type test seems inequitable and misplaced;

and that the test does not go far enough in showing performance, leadership and supervisory ability.

The court said further that the value and reliability of the present promotional scheme was dubious, but that the evidence has not shown the significant adverse impact on minorities which is necessary to support an injunction or imposition of a court-ordered remedial plan. And the court stated that immediate steps should be taken to solve these problems and eliminate ". . . what could become a breeding ground for future litigation."

On these findings and conclusions the court dismissed with prejudice.

II

Standing To Challenge the Entry Level Hiring Procedures

First, plaintiffs argue that the trial court erred in holding that no plaintiff has standing to challenge the hiring policies of the Department. As stated, the court reasoned that the injury alleged by the Association and one officer is that the development of power to negotiate for the betterment of the position of Chicanos is stifled by policies perpetuating under-representation of Chicanos. However, the court concluded that the Association and its members have only an indirect stake in the outcome and are not entitled to assert the right of those directly affected and not otherwise present in the suit—persons unsuccessfully seeking employment or discouraged from doing so.

We must, of course, observe the requirements for standing which have a constitutional starting point in Article III. *Warth* v. *Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343; *Data Processing Service* v. *Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184. The plaintiffs must show that the challenged action has caused them injury in fact, economic or otherwise, and that the interest they seek to protect is arguably within the zone of interests to

be protected or regulated by the statute and the constitutional guarantee in question. Id. at 152-53, 90 S.Ct. 827; *United States* v. *SCRAP*, 412 U.S. 669, 686-90, 93 S.Ct. 2405, 37 L.Ed.2d 254. They must have a personal stake in the outcome. *Warth* v. *Seldin*, supra, 422 U.S. at 499, 95 S.Ct. 2197. This requirement is to insure that concrete adverseness which sharpens presentation of issues on which the courts depend for illumination of difficult constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L.Ed.2d 674; *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663.

Nevertheless, the standing requirement is not to be applied to defeat constitutional claims. An "identifiable trifle" is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation. *United States* v. *SCRAP*, 412 U.S. 669, 689, n.14, 93 S.Ct. 2405, 37 L.Ed.2d 254.

In our case we have both individual plaintiff Chicano officers and the Association maintained for others.[3] The plaintiffs allege that by denying to them and other Chicano citizens the benefits of being hired and promoted—which denial is on the basis of invalid tests and criteria having no substantial relationship to job performance—the effect is to exclude a disproportionate number of Chicano citizens in violation of the equal protection clause and various statutes. The affidavit of Mr. Chavez supports the general claims made, stating that in working with the Department for fair treatment of Chicanos and other minorities, the Association must have the support of as many Chicanos as possible; that only if it represents a substantial number of policemen can they negotiate effectively with the Department from a position of strength; that discrimination against Chicanos in recruitment and hiring dilutes the strength of the Association and directly affects its effectiveness; and that Chavez is personally affected in his attempts to change the system by the effect of what he believes to be discrimination against Chicanos in the entrance procedures of the Department.

[3] This makes inapposite the class action cases relied on by plaintiffs which support the "across the board" theory permitting one plaintiff to challenge all discriminatory practices of an employer. We do not reach this theory in our disposition.

We are satisfied that both the Association and the individual plaintiffs made a sufficient showing of standing. This was demonstrated, we feel, by undisputed proof and reasonable and obvious inferences. The Association had 44 signed members at the time of trial (Nov. 26, 1973), and about 50 members in all (Tr. 82). Of these only one or two were Anglos. Id. In the period from April to June, 1973, the court's findings state that there were approximately 70 Spanish-speaking/surnamed officers and approximately 312 Anglo officers on the force (see Finding 23). Thus, from the proof it is clear that a substantial portion of Chicanos obtaining employment on the force joined the Association. The Association therefore has a direct stake, independent of its members' rights under the Civil Rights Act, in challenging barriers against employment of those from whom it might well enhance its membership and resources to attain its goals. *Warth* v. *Seldin*, supra, 422 U.S. 511, 95 S.Ct. 2197; *Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319, 1322 (2d Cir.).

We are also satisfied that the proof made a sufficient showing of standing of the individual plaintiffs to challenge the hiring procedures. There is recognition of secondary effects on others as a valid basis for standing in several instances. In *Marable* v. *Alabama Mental Health Board*, 297 F.Supp. 291, 297-98 (M.D. Ala.), the court upheld the standing of individual mental patients for themselves and for a class to challenge the discriminatory hiring practices affecting staff personnel of the institution where they were located. The court reasoned that the sec-

ondary effects of discrimination on the plaintiffs as patients entitled them to challenge the hiring procedures relating to the staff personnel. Ibid. In like manner the standing of students to challenge the discriminatory policies of teacher assignments has been sustained on the rationale that the removal of a discriminatory educational system and the achievement of a non-racially operated system afforded standing rights to individual plaintiffs. *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458, 472-73, 478 (M.D.Ala.), aff'd *sub nom. Wallace* v. *United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422.

Moreover, this court recently affirmed a similar order for transfer of school officials, recognizing implicitly the standing of individual students to assert the invalidity of discriminatory personnel policies affecting others because the policies had a secondary effect on the students. See *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, Unpublished Order (10th Cir., January 31, 1975), cert. denied, —— U.S. ——, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). The fact that harm from discriminatory hiring policies is imposed directly on the rejected or discouraged applicant does not deprive the present Chicano officers of standing to challenge the hiring practices that are asserted to produce an under-representation of Chicanos on the force. The indirectness of the injury to the employees does not necessarily deprive them of standing to vindicate their rights. See *Warth* v. *Seldin*, supra, 422 U.S. 504-05, 95 S.Ct. 2197, and to seek removal of the taint of racial discrimination from the work force.[4]

[4] There is a substantial factual basis for the claim that discrimination exists at the entry level. The evidence of under-representation throughout the police force apears in Part III, infra. Additional evidence reflects a racial disproportionality in the results of entrance examinations administered by the defendants between 1971 and 1973. Based upon a large sampling of examinees, it appears that the pass rate among Spanish-surnamed Americans was approximately 43.2% for the years 1971 through 1973, while the non-Spanish-surnamed Americans passed at a 78.9% rate; a pass rate ratio of 1.83:1. (Exhibit 2; R. 328).

In sum, we are satisfied that both the Association and the individuals made a sufficient showing of standing to challenge the allegedly discriminatory hiring policies and, of course, there is no indication of a lack of concrete adverseness between the position the plaintiffs take and that of defendants. See *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. It follows that we must hold that the court was in error in its findings and conclusions denying standing to plaintiffs to challenge the entry level hiring procedures.

III

The Trial Court's Ruling that no Prima Facie Case was made by Plaintiffs

Plaintiffs' second argument on appeal is that the trial court erred in holding that plaintiffs had not made out a *prima facie* case against the promotion level procedures and in dismissing their claim for relief from such allegedly unlawful procedures. More specifically plaintiffs say the court erred (1) by excluding evidence relating to prior examinations; (2) by concluding plaintiffs had not established a *prima facie* case on the evidence presented; (3) by ignoring, as a consequence of its rulings as to standing, the relationship between promotions and discriminatory hiring practices; and (4) by dismissing their showing as not statistically significant because any significance of the slightly less than two to one ratio on the sergeant's test was undermined by the testimony.[4a] (Brief of Plaintiffs-Appellants at 27, 34).

First, we feel the exclusion of the prior examinations poses a serious question. Plaintiffs offered proof of the

[4a] Although not explicitly set out in the findings, the two to one pass rate ratio derived by the court is apparently the correct statistical comparison of the pass rate of non-minority examinees to the pass rate of the minority examinees. See *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333 at 1335, n.3 (2d Cir. 1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); see also cases cited therein.

results of examinations from 1966 to 1971 (Plaintiffs' Exhibits 7-12). Objections were made on the ground of relevancy to these exhibits, defendants arguing that an intervening and different examination was now being given and that the results of the old examinations were irrelevant (See Tr. 49, 53; and the various objections at 49-60). Other objections are said to have been urged and are now argued on appeal to support the exclusion of the exhibits (Answer Brief of Defendants-Appellees at 12-15). We read the record to have raised only relevancy and must assume this was the basis for the trial court's exclusion of the proof.[5]

We agree with the view that the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964. *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1175-76 (2d Cir.); see *Sabol* v. *Snyder,* 524 F.2d 1009, 1012 (10th Cir. 1975). Relief may be had from artificial, arbitrary and unnecessary barriers to employment when they operate invidiously to discriminate on the basis of racial or other impermissible classifications. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158. While the employer's intent may be examined, *Griggs* supra at 432, 91 S.Ct. 849, the plaintiff needs only to show that the challenged procedures have a discriminatory result, *Griggs,* supra at 432, 91 S.Ct. 849. This showing would make out a prima facie case, requiring the employer to demonstrate that his employment criteria or tests were validly job-related. *Spur-*

[5] There was no express ruling on the objection. However the trial court's detailed findings treat only the latest promotional examinations given on June 2, 1973, and it is apparent that the court did not weigh the earlier examinations in its considerations.

On the further trial for which we are remanding, the trial court may, of course, consider authenticity or other objections timely made and the defendants may develop the weaknesses which they say exist as to the exhibits covering past years.

lock v. *United Airlines, Inc.,* 475 F.2d 216, 218 (10th Cir.); *Chance* v. *Board of Examiners,* supra, 458 F.2d at 1176.

Obviously, the scope of proof must be broad to establish such a *prima facie* case. It is open to the plaintiff to develop proof of the general overall trends in hiring and promotion policies. See *Rich* v. *Martin-Marietta Corp.,* 522 F.2d 333, at 343, 345 (10th Cir. 1975), and this may necessitate "a backward glance. . . ." *EEOC* v. *University of New Mexico, Albuquerque,* 504 F.2d 1296, 1304 (10th Cir.). In our type of case we must agree with the view in *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1171 (2d Cir.), where examinations given during several past years to large numbers of applicants were considered.[6]

Defendants argue that the prior tests were different from those given on June 2, 1973.[7] However, if such an objection were sustained an employer could always say that he regularly changes examinations and thus insulate unlawful practices from scrutiny.[8] We cannot agree with

[6] We note that a compilation of prior test results was relied upon in *Bridgeport Guardians,* supra, 482 F.2d at 1335 (five years of entrance exams; twelve years of promotional exams were admitted, although for some reason the court did not compile the statistics on the promotional exams), see 354 F.Supp. 778 at 795; in *Chance* v. *Board of Examiners,* 330 F.Supp. 203 at 209 (S.D. N.Y.1971), aff'd, 458 F.2d 1167 (2d Cir. 1972) ("50 supervisory examinations given over the past few years."); in *Commonwealth of Pa.* v. *O'Neill,* 348 F.Supp. 1084 at 1101 (E.D. Pa. 1972), aff'd, 473 F.2d 1029 (3d Cir. 1973) (three written promotion exams given between 1968 and 1970); and in *Harper* v. *Mayor and City Council of Baltimore,* 359 F.Supp. 1187 (D.Md. 1973) modified sub nom. *Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1973) (the court considered exam results from 1971, 1963, 1960, 1957 and 1956, 5 exams), see 359 F.Supp. at 1198-99.

[7] The trial court found that the examinations given on June 2, 1973, had not been given before and are not to be given in the future (R. 289).

[8] We assume that an employer would regularly change at least the specific questions on examinations to avoid them becoming simply a memory exercise to recall answers to available prior tests.

defendants' theory and instead feel that prior procedures, at least for the years here offered, were relevant.

The question of relevance and of remoteness of exhibits in time is, of course, generally within the discretion of the trial court. Here, however, we are satisfied that the proof offered was clearly within a reasonable time frame and should not have been rejected as irrelevant. In this connection we note that such proof need not show a racially disproportionate impact with mathematical nicety; its purpose is initially to premise a finding whether a *prima facie* case is made; such a finding does not decide the case and instead only places the burden on the defendant to justify the testing criteria in question. *Vulcan Society of the New York City Fire Department* v. *Civil Service Commission of the City of New York*, 490 F.2d 387, 393 (2d Cir.).

In the circumstances before us we feel rejection of the exhibits of these plaintiffs as irrelevant was error.

Second, plaintiffs argue the trial court erred in dismissing the 2 to 1 ratio as statistically insignificant because of the smallness of the sample and undermining of its significance by the testimony (Brief of Plaintiffs-Appellants at 34). They are pointing to the Court's conclusion that they failed to show that the promotional examinations caused a statistically significant discriminatory impact on Spanish-speaking/surnamed officers, and that "there was no showing that any other examinees were able to pass with equal or less preparations." (R. 290).[9]

We must disagree with the ultimate findings and conclusions of the trial court. The smallness of the sample should not be grounds here for rejecting the proof. If it

[9] There was some testimony that the Chicano group assigned reading of books to certain persons and relied on review of outlines prepared by them (R. 94-95, 158-59).

were, the tendency would be to deny employees in small plants the type of protection the civil rights statutes afford. Moreover, here the inability to evaluate the test effects on a larger scale resulted in large part from the exclusion of the results of the several prior examinations. And, in any event, we feel the group tested was not too small to be evaluated as significant. See *Brito* v. *Zia Co.*, 478 F.2d 1200, 1205 (10th Cir.).

Moreover, we note that although the court found that no *prima facie* case was made it was observed that: Defendants need to improve recruitment and promotion policies in order to alleviate the underrepresentation of the Spanish minority at all levels of the department (R. 291).[10]

[10] The record in the present case reflects a statistical discrepancy between the Chicano population of Bernalillo County, and the Chicano representation in the Albuquerque Police Department. The Chicano population of Bernalillo County is approximately 39.2% (Exhibits 26, 27; R. 471, 472). The statistical breakdown of the Albuquerque Police Department as of August, 1973, based on testimony of plaintiffs' witness is approximately as follows:

	No.	%
Chicano	86	21.4
Non-Chicano	316	78.6
Total	402	100.0

(Tr. 643).

Although the Chicano population of the county is approximately 39.2%, only 21.4% of the police force is Chicano. The malapportionment becomes more significant when the police force is broken down by rank. None of the police captains are Chicano; only 4.5% of the police lieutenants are Chicano; (i.e. one out of twenty-two); 18.3% of the police sergeants are Chicano; and 31% of the patrolmen are Chicano (Exh. 13, R. 398, Tr. 641). It is apparent that the representation of Chicano within the police department as a whole diminishes at the higher rank; that the bulk of the Chicanos are employed at the lower levels. At every level of the Department, however, the Chicano population of Bernalillo County is under-represented.

In view of the facts concerning the small Chicano representation, as well as the errors which we are persuaded occurred, we are convinced we should set aside the findings and conclusions and remand for a new hearing and reconsideration.

There remains the trial court's reference to the lack of a showing that "any other examinees were able to pass with equal or less preparation." (R. 290), an apparent allusion to the testimony that outlines prepared by others, and not the text books, were studied by the Chicago officers.

We have noted no authority supporting the imposition of such a burden on the plaintiff. If the proof surrounding a test showed a lack of good faith effort by minorities to pass, we do not say this factor should be ignored. But in this case we feel the burden imposed was unjustified in connection with a showing for a *prima facie* case. Our conclusion here is re-enforced when we recall the trial court's unfavorable observations concerning the type of tests used:

> The heavy reliance placed on the achievement type test seems inequitable and misplaced. It does not go far enough in showing performance, leadership and supervisory ability. (R. 291).

It seems illogical to say the type of test was improper and at the same time to hold the *prima facie* showing of plaintiffs was defective because they did not prove that any other examinees were able to pass such tests with equal or less preparation.

Other arguments are made by the parties but we need not discuss them. What we have said shows our reasons for concluding that errors in the standing determination on the entry level issue as well as in the treatment of the promotional level proof require a retrial. Accordingly, the findings, conclusions and judgment are vacated and the case is remanded for further proceedings.

On Petition for Rehearing

This matter comes on for consideration of the petition filed by defendants for rehearing together with a suggestion that there be a rehearing en banc.

Upon consideration whereof, we conclude that the rehearing should be denied and it is ordered denied. No judge having requested a poll on the suggestion for rehearing en banc, that suggestion is denied. Rule 35(b), Federal Rules of Appellate Procedure. Our reasons follow:

First, defendants argue that the opinion is at odds with *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, saying that neither the Association nor the individual plaintiffs have shown injury to themselves sufficiently to meet the requirements of *Warth*, and that they may not assert the rights of third parties.

The opinion details the showing of standing we feel sufficient under *Warth*. We need only emphasize that there is an adequate showing, we feel, of a personal stake by the Association and individuals to challenge the hiring policies. *Warth*, supra at 499, 95 S.Ct. 2197. The Association, as indicated by the evidence, see note 1 of the opinion, seeks to encourage racial harmony and to discourage racism and discrimination. The underrepresentation of Chicanos on the police force, see notes 4 and 10 of the opinion, would have an obvious effect in restricting membership and resources available to the organization for furthering these purposes (Plaintiffs' Exhibit 1; affidavit of Frank Chavez, R. Vol. I, 202, stipulated into evidence subject to objections, id. at 194). The individuals make a similar showing of injury to themselves due to the effect of discrimination on the workforce. The proof was that restriction of Chicano employment by discriminatory entrance procedures weakened both the Association and individual efforts to change promotion policies (Affidavit of Frank Chavez, R. Vol. I, 202).

We are convinced that for standing purposes injury to the Association and individuals is sufficiently shown in connection with composition of the workforce, and the fact that specific harm occurs to third parties not hired does not deprive these plaintiffs of standing to vindicate their own rights. *Warth, supra* at 504-05, 95 S.Ct. 2197.

Second, defendants turn to the opinion's treatment of the trial court's ruling that a prima case was not made to challenge the promotion level procedures. In part they challenge our holding that it was error for the trial court to exclude as relevant the proof concerning the prior examinations from 1966 to 1971 (Plaintiffs' Exhibits 7-12).

Defendants say that reversal is not warranted because in addition to the relevancy objections raising the grounds of errors in tabulation, erroneous conclusions and authentication, citing record objections in Vol. VI, at 116 and 119. It is clear, however, that these other objections were directed to other exhibits, that is Exhibits 3 and 4, and not to the examinations in question (R. VI, 108, 116, 119).

Defendants argue also that even if the trial court erroneously excluded the exhibits as irrelevant,[1] there were other tenable grounds for exclusion—lack of authentication, compilation errors, et cetera, so that the ruling should not be reversed, citing Hamling v. United States, 418 U.S. 87, 108 n. 10, 94 S.Ct. 2887, 41 L.Ed.2d 590, *inter alia.*

Without considering whether such rule would apply here, this record convinces us that rejection of all the proof of prior examinations cannot be sustained here. The trial court admitted, without objection, plaintiffs' summary of the 1973 examinations, Exhibit 14, containing tabulations made apparently in the same way and by the same witness,

[1] Defendants also contend that we should presume that the exhibits were actually considered and discounted as unreliable. (See Petition for Rehearing, 13).

Mr. Chavez (R. V, 63; VI, 144), whose tabulations for the other exhibits covering the prior examinations are challenged as inaccurate, et cetera. Exhibit 14 was apparently accepted and relied on by the trial court whose findings cite Chavez' figures (R. I, 288). Thus it would be unfair here to say that the other grounds of objection to Exhibits 7-12 concerning the prior examinations—such as unreliability and the like—existed and were "tenable."

The prior examinations were not mentioned in the findings or conclusions of the trial court and there was no express ruling on the relevancy objections made. The 1973 examination was discussed in detail. We are satisfied that the exhibits concerning the earlier examinations were excluded from consideration by the trial court as irrelevant, and that this is the only tenable ground to consider in the posture of this appeal. And regardless of whether the exhibits were excluded as irrelevant, or considered unreliable and wholly discounted, we are convinced we cannot sustain the failure to give any consideration to them.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1481

ROBERT V. STOVER, *et al.*,
Petitioners,

vs.

CHICANO POLICE OFFICERS' ASSOCIATION, *et al.*,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1481

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ROY BACA, ROBERT T. POOLE, NANCY KOCH, LOUIS SAAVEDRA, RICHARD VAUGHN, City Commissioners for the City of Albuquerque, all of the above individually and in their official capacity, and HERB SMITH, City Manager, individually and in his official capacity,

Petitioners,

vs.

CHICANO POLICE OFFICERS' ASSOCIATION and SEGILFEREDO SANCHEZ, VINCE VILLANUEVA, DANIEL GARCIA, ARCHIE BORUNDA, ELOY SANCHEZ, ROBERT CHAVEZ, FLAVIO ROMERO, ERNEST OLAGUE, DAVID GARCIA, MAURICE MOYA, FRANK CHAVEZ and ROY BESERRA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 526 F.2d 431. The District Court made written findings and conclusions, although no written opinion was rendered (R., Vol. I, 285).

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on November 20, 1975. Petitioners filed, in the Court of Appeals, a Petition for Rehearing and Suggestion for Rehearing en banc, which were denied on January 14, 1976. This petition for writ of certiorari was filed April 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that an unincorporated association (composed primarily of incumbent Chicano police officers) and individual Chicano police officers have standing to challenge the hiring procedures of a municipal police department under 42 U.S.C. §§ 1981, 1983, and 1985 and other federal statutes.

2. Whether the Court of Appeals correctly held that results of promotional examinations administered in prior years are relevant to both the individual and Association claims that the promotional examinations have a discriminatory impact in violation of 42 U.S.C. §§ 1981, 1983, and 1985.

3. Whether the Court of Appeals correctly held that the results of prior examinations under the circumstances of this case were improperly rejected as irrelevant.

4. Whether the Court of Appeals correctly held that the size of the test sample group in this case was not too small to be evaluated as significant.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, Article III and Amendment XIV; and 42 U.S.C. § 1981, 1983, and 1985 are set forth in the Petition for Certiorari, p. 3.

STATEMENT

This suit was filed by twelve individual Chicano police officers and the Chicano Police Officers Association (Association) against named officials of the City of Albuquerque, New Mexico alleging certain employment practices and procedures of the Albuquerque Police Department (Department) as constituting unlawful employment discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 1985 and other federal statutes (R., Vol. I, 9). Respondents were plaintiffs in the case below.

The complaint alleged both the hiring and promotion procedures of the Department were racially discriminatory against Spanish-speaking and surnamed Americans. The complaint stated the Department hiring and promotion procedures, including tests and other job criteria used by the Department, are not substantially related to job performance and have the effect of excluding a disproportionate number of Chicanos from employment and promotions in the Department. The complaint sought declaratory and injunctive relief to bar future discrimination and correct the continuing effects of past discrimination.

The evidence at trial showed that the Chicano population of Bernalillo County, where Albuquerque is located is about 39.2% of the total population (Exhibits 26, 27; R. 471, 472). The Department had 402 employees, of whom just 86 (21.3%) were Chicano as of August 1973 (Tr. 643). The distribution of the Chicano police officers throughout the Department was highly stratified by rank. None of the seven police captains were Chicano; only one of the 22 lieutenants was Chicano (4.5%); 18.3% of the sergeants were Chicano; and 31% of the police patrol officers were Chicano. (Exh. 13, R. 398, Tr. 641). This distribution reflected the concentration of Chicanos in the lowest ranks of the Department.

The entry level and promotional opportunities for police officers are determined by written examinations. At all times since 1965 promotion to the ranks of sergeant and lieutenant has been conditioned upon the successful completion of a written exam (Tr. 175, 179, 182-183, 268.) A satisfactory score on an entry level examination is a requirement for acceptance into the police academy. A regulation adopted in 1971 extended the written examination requirement to the rank of captain and established a requirement of six college units

successfully completed during each calendar year in which the applicant takes a promotional examination up to a baccalaureate degree.

At trial Respondents offered and the trial court excluded evidence of prior written examinations for promotions which Petitioners objected to as irrelevant and were excluded at the trial (R. 288-89, 313). For the sergeants examinations in the years 1966, 1969, and 1970, 258 Anglos were examined and 118 or 46% passed, compared to 79 Spanish surnamed persons examined of whom only 11 or 14% passed. For the lieutenants examination during the years 1966, 1968 and 1970, 54 Anglos and 13 Spanish surnamed Americans were examined, of whom 33 (61%) of the Anglos passed compared to seven (53%) of the Spanish surnamed Americans who passed. (Pl. Exs. 8, 9, 10, 11, 12; Tr. 53, 55, 57, 59, 60; R. 294-295.) The Respondents offered the results of the entry level examination for the years 1971 through 1973. (Pl. Ex. 2; Tr. 33, 34.) These results showed that of 1,300 examinees, 43% of the Spanish surnamed applicants passed (119 of 273), while 78% of the Anglo applicants passed (811 of 1,027). The District Court did not consider these results in making its findings.

The most recent promotional examinations were conducted by the Department on June 2, 1973. Six of the named Respondents took the sergeants examination and two took the lieutenants examination; all of whom failed to score high enough to be considered for promotion. One of the Respondents examined in June 1973 had also been previously examined for promotion to lieutenant on three attempts (R., Vol. VI, 288).

Three of the Respondents were not eligible to take the promotional examination because of the educational requirements. The results of the June 2, 1973 examinations showed a 19% passing rate for Anglos and 11.5% for Spanish-surnamed examinees on the sergeants examination; the lieutenants examination results were a 14% passing rate for both Anglos and Spanish-surnamed examinees (R., Vol. VI, 63, 64, Pl. Ex. 14).

The Petitioners' expert on testing testified that the results of the 1973 sergeant and lieutenant examinations constituted a "statistically significant" disparity for Spanish-surnamed examinees as compared to Anglos (Tr. 645-46). The Petitioners' test expert testified that the statistics of the June 2, 1973 promotional examinations did not show a significant adverse effect

on Chicanos compared to their numbers in the Department (R., Vol. X, 770-771, 772-787).

On the issue of standing, Respondents testified both as individuals and as members of the Association concerning the direct, personal injury inflicted upon them by discrimination at the entrance level (Tr. 85, 86, 241-43, 249, 375, 276; Affidavit of Frank Chavez, R. 201). The testimony reflects the desire and purpose of the Petitioners to form an Association to correct discrimination at the entrance level and thereby increase the effectiveness of Chicano officers in improving conditions throughout the Department.

After presentation of the Respondents' evidence, and that of two of Petitioners' witnesses heard out of turn, the trial court granted the Petitioners' motion to dismiss under Rule 41, F.R.C.P., on the ground that Respondents had shown no right to relief. The District Court entered a judgment of dismissal in the case holding the Respondents had shown no right to relief (R., Vol. I, 285).

The Court of Appeals held that the District Court's improper findings resulted from its having committed three principal errors of law in: (1)

denying the individual Respondents and the Association standing to challenge the Department's entry level requirements; (2) excluding evidence offered by Respondents to establish a prima facie case against the Department's promotional examinations; and (3) concluding that Petitioners had failed to show a statistically significant adverse impact on Chicanos on the most recent promotional examination. The findings, conclusions and judgment of the District Court were vacated, and the case was remanded to the District Court for further proceedings.

REASONS FOR DENYING THIS WRIT

I. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT RESPONDENTS HAVE STANDING TO CHALLENGE THE ENTRY LEVEL REQUIREMENTS OF THE PETITIONERS.

A. The Court of Appeals Correctly Determined That the Respondents Had Shown a Direct Injury and Interest to Support Their Standing to Sue. That Determination Does Not Conflict With Any Decision of This Court or of Any Circuit Court.

Standing to invoke federal jurisdiction involves the "Case or Controversy" limitation imposed by Article III, Section Two of the United States Constitution and the self-restraint limitations relating to judicial self-governance. Barrows v. Jackson 346 U.S. 249, 255-256 (1953); Warth v. Seldin 95 S. Ct. 2197, 2205 (1975).

Petitioners assert that Respondents lack standing because they have made an insufficient showing of injury in fact and because they seek to assert the constitutional rights of third parties (Jus tertii) which, as a general proposition is prohibited. Tileston v. Ullman 318 U.S. 44 (1943). Petitioners rely almost exclusively on Warth v. Seldin, supra, to

substantiate their claim that Respondents' standing to sue is precluded on the two foregoing grounds.

The court held in Warth there had been no showing of "substantial probability" as neither past construction efforts nor concrete future plans were likely to satisfy plaintiffs housing needs (95 S. Ct. at 2209) in a challenge to a zoning ordinance. The court held that Plaintiffs' inability to reside in Pennfield, for one group of Plaintiffs, was a consequence of the economics of the area housing market and not its zoning practices, i.e., there had been no showing of injury to them by Pennfield's acts. This class of Plaintiffs had no standing because Defendants had not caused injury to them. (See 95 S. Ct. at 2209.) There was no casual link demonstrated between Plaintiffs' exclusion and Pennfield's zoning practices.

A second group of claimants were Rochester taxpayers alleging that Pennfield's policies forced Rochester to grant a tax abatement which in turn placed a greater tax burden on other property owners, like themselves, to pay for city services. The court ruled that this group had no standing because the higher taxes paid

by Rochester residents was not the result of inexorable economic consequences but resulted from the decision made by Rochester authorities to subsidize low income housing (95 S. Ct. at 2210). The court added that these plaintiffs could not assert the legal rights of others in order to obtain relief from injury to themselves (95 S. Ct. at 2210-11.)

Another group of plaintiffs in Warth was composed of Pennfield residents alleging the denial of the benefits of living in an integrated community, relying on Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). The Warth court distinguished Trafficante on the ground that it involved a statute establishing standing even where the plaintiff has suffered no judicially cognizable injury. This class of plaintiffs had made no such claim under such statute.

A fourth group of plaintiffs was composed of housing contractors associations asking damages and injunctive relief. Relative to the latter claim for relief the court stated that no standing was evident as there had been no showing that a specific project had been

prospective relief sought by the home builders could have standing as the representative of its members only if there were alleged facts sufficient to make out a case or controversy had the members themselves brought suit. The failure to show the existence of any injury to its members of sufficient immediacy and ripeness precluded establishing standing to warrant judicial intervention. Warth, 45 L. Ed. 2d 343 at 365.

Juxtaposing the foregoing to the facts in the case at bar, it is apparent that the Chicano Police Officers' Association and the individual named Plaintiffs have suffered a cognizable injury sufficient to accord them standing to sue. The record discloses that at trial there were approximately 402 commissioned officers, 86 of whom were Chicanos. (R. Vol. VI, 82.) The Chicano population of Bernalillo County at the time of trial was approximately 39.2% (Exhibits 26, 27, R. 471, 472.) The Association had about 50 members on November 26, 1973, the time of trial (Tr. 82). Some months prior to the trial the total number of Chicano officers was approximately 70 (Trial Court's finding

number 23). Consequently, Chicanos comprised approximately 21 per cent of the commissioned officer population, which is slightly more than half of their numbers in the relevant population base. Nearly two thirds of all Chicano commissioned officers were members of the Association. The invalidation of the challenged entry level procedures would indicate a "substantial" probability of almost certainly increasing the number of Chicanos in the Association. Conversely, maintenance of the challenged entry level procedures would operate to the detriment of the Association by maintaining their numbers at the same or a reduced level. Thus the "substantial probability" that was found lacking in Warth, is patent in the present case; and thus comports with the mandate of that case as injury to the Association is directly traceable to Petitioners' exclusionary policies. Additionally, it is clear that the requisite causal link between Petitioners' exclusionary policies herein and the underrepresentation of Chicanos on the force, which both Trial and Appellate courts found, has been established.

Particularly relevant is the testimony of

Ms. Helen Lopez, an associate member of the Association. S e applied for a sworn personnel position but fa led to meet the height standard for female officers of the Department (R., Vol. VII; 524-26). Although Ms. Lopez is not an individually named party to this action, the Association represents her prospective employment interests and those of other members applying for sworn officer positions in the Department. The Court of Appeals correctly determined that there was an adequate showing of a personal stake by the Association and individuals to challenge the hiring policies of the Department under Warth. Petitioners seek to limit a challenge to an employers tests to those persons examined in each examination. This is obviously a waste of judicial resources to require additional suits by applicants. Respondents believe that an action raising the employment issues addressed herein most efficiently and properly provides the opportunity for the vindication of the rights involved.

In addition to the stated objectives of

the Association, there were efforts by the Association to change the hiring practices of the Department (Exhibit 17, R. 101). These efforts form the basis for a live, concrete dispute essential to justiciability found lacking in the claims of housing contractors association in Warth.

B. The Court of Appeals Correctly Ruled that Respondents' Standing to Sue Is Not Barred by the Doctrine of Jus Tertii Which Determination Does Not Conflict With Any Ruling of This Court Nor of Any Other Circuit Court.

Petitioners assert That Respondents' argument is identical to the one presented by Metro-Act in Warth. Although Petitioners correctly state that Respondents complain of acts which deprive them of racially integrated police force, Respondents also claim that the acts also deprive them of their right to associate. The right to associate applies to the benefit of the members of the Association and also to the Association itself. The named Plaintiffs and the Association by asserting this right are asserting their right to associate and not those of third parties, and there is thus no genuine jus tertii claim.

Only where the Association is asserting the substantive protections of its members is the assertion one of jus tertii. Assuming arguendo, that Respondents herein were not claiming constitutional violations of their rights but those of third parties, the Association would still have jus tertii standing as they stand in a professional relationship which is adversely affected by the actions of Petitioners which deal with the subject matter of that relationship. Thus in Brewer v. Hoxie School District 238 F.2d 91 (8th Cir. 1956) it was held that a school board had standing to sue under the Civil Rights Act, to enjoin Defendants from interfering with the operations of the schools on a desegregated basis. The school board there claimed that such interference deprived admitted Negros of equal protection, since the interference was calculated to force the board to rescind its desegregation order. Apparently, the interference by the defendants did not violate any consitutional rights of the board, but the board was adversely affected by it, since it could not carry on its work. Brewer comports with the decisions rendered by this court. NAACP v. Button 371 U.S. 415 (1963); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Can it be said that the Associa-

tion, assuming, no direct violation of its rights, can carry on its efforts unaffected by Petitioners exclusionary policies? The answer must be no. The denial of standing to the Association in this context must affect it directly; since its general inability to carry on its purpose would discourage prospective numbers from joining and prompt those who are already members to withdraw from its membership. It is clear that the Association has standing in its own right.

Nor is the Respondents' position herein a departure from established jus tertii doctrine. In Barrows v. Jackson, supra, a covenantor of a restrictive covenant brought suit against a white covenantor who sold, in violation of the covenant, to a Negro. This court held that the white covenantor was the proper person to assert the rights of the vendee despite the latter's absence. A very determinative factor in allowing the assertion of the absentee Negro vendee's rights by the white vendor was the inability or impracticability of the Negro whose rights were asserted to protect those rights themselves. The victims of the possible discrimination would not be known (the court referred to them as "unidentified but identi-

fiable" - persons who might want to purchase a house, but could not do so because of racial restrictive covenants) and it would be difficult to prove that the vendor's decision not to sell was due to his fear of being subjected to a damage action. Moreover, there would be no way, even under broad intervention rules, that a Negro could become a party to any proceeding to protest that the awarding of damages to a vendee would impair his right to purchase property in the future.

Many of the considerations weighing in favor of the vendor in Barrows weigh in favor of the individual named Petitioners and the Association here. There exists a general inability and impracticality by unsuccessful entrance level examinees, whose rights it is claimed are being asserted, to protect those rights themselves. The examinees know that they were rejected on the basis of a written examination. It is generally assumed by examinees that an examination effectively measures one's ability for a position. The affected examinees would quite likely assume that they were unsuited for the position because they had failed the examination. The general inability of Chicano entry level

examinees to challenge the testing proceedings is exacerbated by the fact that under § 2000-5(e) of Title VII all of those Chicanos whose names appear on Plaintiffs Exhibit 2 would have lost their claims on the three hundred first day after their rejections. The only Plaintiffs then capable of vindicating these rights would be Respondents herein (R. Vol. 5, Plaintiffs Exhibit 2). Moreover, the results on the examination are highly fragmentized which makes it greatly more difficult to discern a pattern or practice of recurrment rejection of a given group. On examinations given over several years, only those with the ability to observe the results on those examinations over a period of years can effectively discern constitutional violations. The Respondents herein would be in the best position, if not the only position, to know the victims of the discrimination. Moreover, absent an association and individual members, such as the Chicano Police Officers Association and the individual Respondents herein, whose avowed objective is equality in hiring, it is unlikely that an unsuccessful examinee would challenge a prospective employers hiring practices. The spectre of the employer's

reprisal for such a challenge would weigh heavily against such a challenge. The only effective challenge to the Department's hiring practices has been by the Association.

As stated, the Warth court alluded to the jus tertii claims of Rochester taxpayers and dismissed them (95 S. Ct. at 2210-11) asserting that the actions by the Rochester taxpayers were not essential to the employment by poor non-residents of their constitutional rights. This court opined that the tax rates of Rochester residents was in effect, and not a cause, of the exclusion of the poor from Pennfield.

In general in those cases permitting assertion of jus tertii the court has found the presence of at least one of three factors; the presence of some substantial relationships between the claimant and the third party whose rights the claimant seeks to invoke, Eisenstadt v. Baird, 405 U.S. 438, 445 (1972); Griswold v. Connecticut 381 U.S. 479, 481 (1965); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958); the unpracticality of the right holder asserting their own constitutional rights; Eisenstadt v. Baird, supra, NAACP v.

Alabama, supra, and Bantam Books Inc. v. Sullivan 372 U.S. 58, 65-66 n. 6 (1963) (dictum); the need to avoid the dilution of the right-holder's constitutional rights which would result were the assertion of jus tertii not permitted. Eisnestadt v. Baird, supra, Griswold v. Connecticut, supra, Barrows v. Jackson, supra, at 257, and the need to protect fundamental rights, which would be denied if the assertion of jus tertii were not permitted. Barrows v. Jackson, supra at 257.

Respondents submit, their action falls within the mandate of Warth and its predecessors relative to any jus tertii claims by them.

Assuming that the Respondents assert a genuine jus tertii claim, would the denial of such assertion deprive the right holders of a fundamental right? Respondents respectfully submit the right holders in this case would be deprived of a fundamental right which denied would concommitantly blunt the anti-discrimination policy "that congress considered of the highest priority" Otis v. Crown Zellerbach Corp., 398 F. 2d 469, 499 (5th Cir. 1968).

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO FIND ERROR IN THE EXCLUSION OF EVIDENCE ON PRIOR EXAMINATIONS RESULTS IN ESTABLISHING A PRIMA FACIE CASE.

Contrary to what Petitioners represent, the holding of the Court of Appeals does not stand for the preposition that "even if the results of the challenged examinations showed no discriminatory impact, the aggregate results of totally different examinations given in the prior seven years should have been considered." (Petition for Writ of Certiorari at 17.)

First, the Court of Appeals held that the June 2, 1973 examination had an adverse effect and was not too small to be evaluated as a statistically significant impact on Chicanos. Second, that evidence of disparate pass rates between the Chicanos and Anglos on prior promotional examinations was clearly within a reasonable time frame and should not have been rejected as irrelevant in considering the June 2, 1973 examination. That holding is consistent with holdings by this court and other circuit courts of appeals.

A. The Court of Appeals Ruled That Petitioners Are Bound By And to Their Objection to The Proffered Evidence to The Stated Grounds of Relevancy.

As a preface to any discussion of the case law relating to the question herein, Respondents would respectfully point out to this court that the issue of errors in computation relative to prior promotional examinations was not properly before the district court or the Court of Appeals. It is not before this court, nor has it been before any other court, since no errors in computation were shown. On cross examination minimal errors at most were shown by Petitioners to the following exhibits: Exhibit #3 (R. Vol. VI 108), a summary of classes that have passed through the Albuquerque Police Academy which included classes 31-40. The only classes on which the witness Ray Chavez was cross-examined were classes number 31 (R.Vol.,VI 109-111), number 33 (R. Vol., VI 110), number 34 (R. Vol., VI, 111), number 39 (R. Vol. VI, 111), and number 40 (R. Vol. VI, 113). The witness was further cross-examined, relative to computational errors, on exhibit number 4, Compilation Summary of Police Aides hired under LEAA Grant, (R. Vol.VI, 116), and

exhibit number 5, Incentives Pay Award Summary, (R. Vol. VI, 120). None of the foregoing in any way relate to or involve prior promotional examinations. The witness was cross-examined on exhibits numbers 8 (R. Vol. VI, 130), 11 (R. Vol. VI, 132), and 12 (R. Vol. VI, 132), but that examination never questioned computation errors but merely involved the interrogation of the witness relative to what other factors entered into the determination of whether a person's name would be placed on the promotional list (see e.g. R. Vol. VI, 132). Additionally, there was no voir dire of the witness upon introduction of the exhibits relating to prior promotional examinations which were composed of six exhibits. The witness was cross-examined only on the above-mentioned three of the six. Consequently, since no errors in computation on prior promotional examinations were shown, either by way of voir dire or on cross-examination, there was no ground for rejecting those exhibits on that basis and it could not possibly constitute a matter properly before this or any other court.

Moreover, even if there were proper grounds to raise the foregoing issue, Petitioners misapply the law which this court has promulgated on the subject. Petitioners cite Hamaling v. United States, 418 U.S. 187 (1974) and Kansas City Southern Railway Co. v. Jones, 241 U.S. 181 (1916) in support of their claims. Neither of these cases stand for the proposition which they propose. Respondents would apply the case of McCandless v. United States 298 U.S. 342, 80 L. Ed. 1205, 56 S. Ct. 764 (1936) as standing for the proposition that where evidence has been objected to as inadmissable for certain specific reasons, the objection will be deemed to be limited to the grounds which have been specified (". . . no objection was made. . . such as is now urged" 298 U.S. 342 at 346).

B. The Ruling of the Court of Appeals That Prior Examination Results Were Relevant Corroborative Evidence of An Adverse Impact was Correct, Does Not Conflict With Any Ruling of This Court or of Any Other Circuit Court and Does Not Present Any Important Federal Question.

Moreover, the Court of Appeals correctly ruled that evidence of prior promotional

examinations was relevant. See Note, An American Dilemma - Proof of Discrimination 17 U. Chicago L. Rev. 107 (1949). Schmeller v. United States, 143 F. 2d 544 (6th Cir. 1944); United States v. Feldman, 136 F. 2d 394 (2nd Cir. 1943).

C. The Holding of the Court of Appeals Relative to Statistical Significance Was Correct and Does Not Conflict With the Holdings of This Court, Any Decision of Any Other Circuit And Raises No Important Federal Question.

Petitioners assert that the district court's holding on the instability of the pass-fail ratio is supported by the testimony of Dr. Fredrick Carlton (R. Vol. X, 770-78). It is submitted that Petitioners argument is misplaced as the testimony of Dr. Carlton does not address the question. Dr. Carlton's testimony related solely to the question of whether the test results evinced a disparate impact on Chicano examinees. He concluded that, relative to their numbers on the force, Chicanos examinees were not the subject of a disparate impact. The only evidence on the sufficiency of the numbers in the test sample was given by Dr. Norman, Respondents expert (R. Vol. VIII 676). Dr. Norman concluded that for purposes

of proper analysis the numbers involved sufficed. Consequently, the district court's holding that the pass-fail ratio was unstable was unsupported by any evidence in the record. Indeed, the only evidence on the matter was supportive of the holding of the Court of Appeals. The holding of the Court of Appeals comports completely with the holding of this court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

CONCLUSION

Because the decision of the Court of Appeals does not conflict with any holding of this court or any other circuit courts and does not present any important federal question not already decided by this court, a Writ of Certiorari reviewing the decision and opinion of the Court of Appeals should not issue.

Respectfully submitted,

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